The University of the State of New York

The State Education Department
State Review Officer
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No. 09-051

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, G. Christopher Harriss, Esq., of counsel

Thivierge & Rothberg, P.C., attorneys for respondents, Randi M. Rothberg, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Rebecca School for the 2008-09 school year. The parents cross-appeal from the impartial hearing officer's determination that the individualized education program (IEP) that the district's Committee on Special Education (CSE) had recommended for the 2008-09 school year was appropriate. The appeal must be dismissed. The cross-appeal must be sustained in part.

At the time of the impartial hearing, the student was attending a 7:1+3 classroom at the Rebecca School (Parent Exs. A at p. 5; II at p. 1). The student was receiving related services at the Rebecca School, including counseling, occupational therapy (OT), speech-language therapy, art therapy, music therapy, and adaptive physical education (Parent Ex. II at p. 1). The Rebecca School is the student's pendency placement during the instant proceeding pursuant to an unappealed impartial hearing officer's decision dated October 29, 2007 (Tr. pp. 4-7; Parent Ex. B).[1] The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d],

[1] See 20 U.S.C. § 1415(j); Educ. Law § 4404(4)(a); 34 C.F.R. § 300.518; 8 NYCRR 200.5(m).

200.7). The student's eligibility for special education services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student's mother stated that she first noticed the student was not developing typically when the student was between 18 months and two years of age (Tr. pp. 478-79). The student's mother reported that the student was evaluated at the age of two through Early Intervention (EI) (Tr. p. 479). The student received a diagnosis of an autism spectrum disorder shortly after turning two years of age (Tr. pp. 479-80). As a result of the evaluations, the student received home-based EI services of 20 hours per week of applied behavioral analysis (ABA), 5 hours per week of speech-language therapy, and 2 hours per week of OT, as well as team meetings and parent training (id.).

When the student turned three years of age, her parents enrolled her in a general education nursery school for three hours in the morning, with home-based therapy in the afternoon (Tr. p. 481; Dist. Ex. 7 at p. 1). She repeated the "threes" program at the nursery school the following year with the home-based program, and according to the student's mother, she began to progress (Tr. p. 482; Dist. Ex. 7 at p. 1).

The student's mother reported that the student underwent a private psychoeducational evaluation, which was forwarded to the district prior to the student's "turning five" IEP (Tr. p. 518). The student's mother testified that the student went through the CSE's "turning five" process in fall 2006 and was offered placement in a district 12:1+1 class (Tr. p. 519). However, after reportedly speaking with school personnel, including the proposed classroom teacher, the student's mother enrolled the student in the Rebecca School kindergarten program in fall 2006 and rejected the district's placement offer (Tr. pp. 171, 483, 514, 519-20).

The student's mother testified that the student attended the Rebecca School for the 2007-08 school year (Tr. p. 520). In fall 2007, an impartial hearing was conducted at the request of the parents (Parent Ex. B at pp. 1, 3). By decision dated October 29, 2007, an impartial hearing officer (Hearing Officer 1) ordered the district to reimburse the parents' tuition costs at the Rebecca School for the 2007-08 school year for a 12-month period from September 2007 to August 2008 (id. at p. 10). Hearing Officer 1's decision was not appealed (Tr. pp. 5-6; see 8 NYCRR 200.5[k]).

In a progress report from the Rebecca School dated December 2007, the student's speech-language pathologist at the school stated that the student's therapy focused on increasing the student's engagement "over" verbal communicative interactions, elaborating verbal problem solving sequences, and exploring a range of emotions through symbolic and pretend play (Parent Ex. Q at p. 12). The speech-language pathologist reported that the student was able to engage in shared attention and take an interest in people and things in her environment (id.). She noted that the student expressed a variety of emotions with appropriate gestures, facial expressions, tone of voice and contextually appropriate rote phrases, although the student often responded to another student's crying by crying herself (id.). The student reportedly responded to the attempts of others to interact with her and initiated with others using gestures, words, two to five-word phrases, and "repair strategies" when she was not understood (e.g., using gestures and adding words) (id.). Receptively, the student demonstrated the ability to follow novel two-step directives; understood object descriptors, including numbers, shapes, colors, and sizes; grasped time concepts such as night/day and the seasons, but had difficulty understanding "qualitative concepts" (such as more or most), negatives in sentences, and expanded sentences (id. at p. 13). Expressively, the student

made requests using short phrases, used the plural -s and the -ing verb form, could answer "what" questions consistently and "where" and "who" questions emergently, but had difficulty expressing object function, using the possessive -'s, using irregular past tense, using pronouns, and answering "why" and "when" questions (id.).

In a progress report dated December 18, 2007, the student's occupational therapist at the Rebecca School reported that the student presented with multiple sensory processing deficits that interfered with her ability to self-regulate, attend to tasks, transition from one activity to another, filter auditory stimulation, and problem solve in various social situations (Parent Ex. Q at pp. 16, 17). The report indicated that the student was "sensory seeking" and required a sensory diet of proprioceptive, vestibular, and tactile activities both in therapy sessions and in the classroom to assist her sensory processing and increase her ability to function in the classroom setting (id. at pp. 15, 17). The student had been receiving many sensory breaks throughout the day, which allowed her to "be in an environment with decreased auditory input while simultaneously providing her with the proprioceptive and tactile input she craves" (id. at p. 16). When over stimulated or anxious, the student often engaged in a "familiar verbal script" that was completely irrelevant to the activity (id. at p. 15). The student "demonstrate[ed] lack of impulse control resulting in displays of emotional outbursts (crying or yelling scripts) often lasting approximately 5-10 minutes" (id.). According to the progress report, the student was quite rote in her play skills, often playing with high interest items such as dolls, little people or a bus, and was not easily transitioned to a new activity (id.). However, the occupational therapist noted that when regulated and motivated, the student was able to demonstrate attention to tasks for 10-15 minutes (id.). The student's music and art therapy progress reports from the Rebecca School also dated December 2007, indicated similar performance and progress regarding the student's ability to maintain engagement in activities and self-regulate in response to the activities provided by her therapists (id. at pp. 20-25).

In a progress report dated January 2008, the student's head teacher from the Rebecca School reported that the student continued to make "great progress both socially and emotionally" (Parent Ex. Q at p. 2). The student had increased her ability to use methods to help her stay regulated, had increased her engagement level with adults and peers, had increased her awareness of emotions, and was using both scripted and spontaneous language to try to verbally interact with staff and peers (id. at pp. 4-5). The student was beginning to do some "concrete fantasy play" using her scripts, allowing staff to join the scripts and tolerating changes to her scripts (id. at pp. 7-8). The teacher also reported that the student was making academic progress and that her skills were at a late kindergarten to early first grade level (id. at p. 7). The student reportedly read familiar words, words from familiar stories, all letters, the names of the months, and the days of the week (id. at p. 11). In math, the head teacher indicated that the student counted with 1:1 correspondence, identified numbers 1 to 100, rote counted 1 to 100, completed simple patterns (red/blue/red), and understood the concepts of "more" and "less" (id.). The student was also able to write her name and all upper case letters of the alphabet (id.).

The student's psychologist at the Rebecca School indicated in her January 2008 counseling progress report that the student was capable of shared attention and regulation, but at times she became overly active and/or emotionally disregulated and had difficulty focusing on an activity or participating in back and forth interaction (Parent Ex. Q at p. 18). At these times, the student resorted to scripts that she had learned from movies and television shows (id.). The psychologist noted that counseling sessions addressed strengthening the student's ability to maintain focus by

engaging her in highly motivating activities including sensory-based play, puppets, dolls, and watching the fish (id.). The psychologist indicated that recently, the student's social-emotional functioning had progressed to a level whereby she was aware of her surroundings and the people in her environment, wanted to interact with others, and was curious and interested in the emotions, behaviors, and activities of her peers (id.). The student had been participating in sessions with a classmate and had been working on increasing her ability to work through her emotions and to communicate her wants and needs (id.). According to the counseling progress report, the student was using more spontaneous language to initiate interactions with others and understood the concept of turn-taking; however, she often resorted to parallel play with her peers and required prompting to engage with the other children (id.).

On April 15, 2008, the parents signed a contract enrolling the student in the Rebecca School for the 2008-09 school year and paid a total deposit amount of $10,000 (Parent Exs. S; T at p. 5). The contract indicated that, if the student was enrolled in a placement recommended by the district no later than September 8, 2008, the parents would be released from continuing responsibility for tuition payments and would be reimbursed for all prior payments, excluding a $2,500 non-refundable deposit (Parent Ex. S at p. 2).

In preparation for an annual CSE review meeting scheduled for May 7, 2008, the student's mother informed the district that the student's head teacher at the Rebecca School would participate in the meeting by telephone and requested, in advance of the meeting, copies of any evaluations of the student that the district had conducted (Parent Ex. Q at p. 1). The student's mother also provided copies of the student's most recent progress reports from the Rebecca School (id. at pp. 2-27).

On May 7, 2008, the CSE met for the student's annual review and to plan for the student's 2008-09 educational program (Parent Ex. C at p. 1). The meeting attendees included the district special education teacher who also functioned as a district representative, a school psychologist, a regular education teacher, the student's head teacher from the Rebecca School, and the student's mother (id. at p. 2). An additional parent member was not in attendance (id.). The resultant IEP recommended a 12-month 6:1+1 special class in a specialized school with related services of two 30-minute OT sessions in a group of two, two 30-minute individual and three 30-minute speech-language therapy sessions in a group of three, and two 30-minute counseling sessions in a group of three (id. at p. 16).

In the resultant May 7, 2008 IEP, the student's present levels of academic performance reflected that the student was at an early first grade level in decoding skills and listening comprehension, at a kindergarten level in writing skills, and at an upper kindergarten level in math computation and problem solving skills (Parent Ex. C at p. 3). The May 2008 IEP included goals and objectives in the areas of academics, social-emotional and play skills, speech-language skills, and OT (sensory processing and regulation and fine motor planning) (id. at pp. 6-13).

The student's teacher at the Rebecca School testified that she wrote the academic goals with the CSE team at the May 7, 2008 CSE meeting, but felt she was not qualified to address the student's speech-language and OT goals (Tr. p. 311). According to the student's mother, the May 2008 CSE asked her to provide the CSE with copies of the student's soon-to-be-completed spring 2008 progress reports from the student's related service providers at the Rebecca School and to

allow the CSE to use the speech-language and OT goals from these reports to finalize development of the student's 2008-09 IEP (Tr. pp. 484-85). The student's mother agreed to do so (Tr. p. 485).

On May 16, 2008, the student's mother signed and returned the district's "Notice of Recommended Deferred Placement," agreeing to defer the student's start date in the recommended 6:1+1 program until July 1, 2008 (Parent Ex. P).

On June 17, 2008, the district issued a final notice of recommendation (FNR) to the student's mother assigning the location of the student's recommended program (Parent Ex. O). The district also issued an undated "JA-1 12-Month School Year Consent form" which indicated that the student was eligible for summer special education services per her IEP and indicated that if the student's mother wanted the student to receive these services, written consent was required (Parent Ex. N). The JA-1 letter indicated that the student's mother would receive a letter in June 2008 notifying her of the assigned location for the student's summer services (id.).

The student's mother responded to the district in a letter dated July 10, 2008, and informed the district that the consent form may be moot because the district had not identified the location of the summer 2008 program and the student's mother had already secured tuition reimbursement for the Rebecca School for July and August 2008 pursuant to the decision of Hearing Officer 1 (Parent Exs. M at p. 1; N). Accordingly, the student's mother informed the district that the student would remain at the Rebecca School for summer 2008 (Parent Ex. M at p. 1). The student's mother further informed the district that she had received the FNR regarding the student's 2008-09 placement and had attempted to visit the program (id.). However, after making multiple phone calls, she learned that the recommended site was not due to open until September 2008, but an information session at a similar program was to be held later in the week (id.). The student's mother stated that she would be attending the information session in order to evaluate the program identified in the June 17, 2008 FNR and would contact the CSE after the visit (id.). The student's mother testified that she did not receive a response to her July 10, 2008 letter (Tr. p. 491).

The district's information session took place on July 11, 2008 (Tr. p. 220; Parent Exs. CC; L at p. 1). The student's mother attended and was accompanied by the social worker from the Rebecca School (Tr. pp. 220, 489-90; Parent Exs. CC; L at pp. 1-2).[2] After attending the information session and tour of the similar program, the student's mother wrote a letter dated July 15, 2008 to the district enumerating her concerns regarding the program proposed in the FNR (Parent Ex. L). The student's mother's concerns included that: (1) it was unclear whether a seat in the proposed program would be available for the student in September 2008; (2) that the class would not include any peers who were the same age as the student; (3) that the school would not provide sensory facilities adequate to address the student's needs; (4) that the class would participate in breakfast and lunch in large, multi-grade settings without an appropriate level of supervision, which would be very disregulating for the student; (5) that the related services professionals had not been hired yet; (6) that the length of the student's bus trip home would not allow her sufficient time after school to receive any related services that could not be provided by the school; and (7) that summer and fall sessions would not be provided in the same school, which

[2] The hearing record contains a written summary developed by the Rebecca School social worker of the information session and classroom observations (Parent Ex. CC). The hearing record does not indicate if this summary was discussed with or provided to the district.

would necessitate a transition to another school (id. at pp. 1-2). The student's mother informed the district that she did not believe that the 6:1+1 class identified in the June 2008 FNR was an appropriate placement for the student, that she had decided to keep the student in her current placement at the Rebecca School and that she continued to look to the district for reimbursement, subject to any other appropriate placement that the district might offer the student for the 2008-09 school year (id. at pp. 2-3). The student's mother also inquired as to whether there were any other schools that she should visit before the 2008-09 school year began in September (id. at p. 3). The student's mother testified that the district did not send any other FNR or placement recommendation or otherwise respond to her July 15, 2008 letter (Tr. p. 496).

The CSE reconvened on August 15, 2008 for the purpose of adding special transportation to the student's IEP (Parent Ex. D).[3] Meeting attendees included the parents, a district special education teacher, a school psychologist, a school social worker, and an additional parent member (id. at p. 2). The resultant August 2008 IEP reflected additional information in the student's present health status, which indicated that the student had severe motion sickness, had difficulty communicating her needs, cried when frustrated, and that the student had a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS) (id. at p. 5). Limited travel time and air conditioning were added to the student's transportation needs (id. at p. 1). The August 2008 CSE meeting minutes were consistent with the changes on the student's August 2008 IEP and noted the parents' questions and concerns (Parent Ex. F).

The parents filed a due process complaint notice on September 8, 2008, seeking tuition reimbursement for the Rebecca School, services pursuant to pendency, and other relief (Parent Ex. A at pp. 1, 5-6). Specifically, the parents asserted, among other things, that the student's May 2008 IEP was procedurally and substantively defective because: (1) the district failed to designate an actual school location on the student's IEP; (2) the school assignment/classroom that was offered to the student was selected without the parents' input, depriving them of an opportunity to participate as equal members of the CSE team; (3) the May 2008 IEP did not specify the type of extended year (ESY) services recommended for the student; (4) the district failed to include at the May 2008 CSE meeting an additional parent member and an individual to interpret the instructional implications of the student's evaluation results; (5) the district failed to adequately assess and report on the student's present levels of performance; (6) the district failed to indicate the methods of measuring the student's progress relative to her goals and objectives, and many goals and objectives were vague and not objectively measurable and/or inappropriate for the student; (7) not all of the goals and objectives were reviewed and developed at the May 2008 CSE meeting; (8) the district failed to include a speech-language therapist and an occupational therapist on the May 2008 CSE team; (9) the IEP did not include parent counseling and training; (10) the district failed to consider the full continuum of services available for the student; (11) the services on the May 2008 IEP were insufficient to meet the student's needs; (12) the district predetermined the student's placement and school assignment; (13) the district failed to identify a program for the student for summer 2008; and (14) the district's proposed program was inappropriate for the student because the school's sensory facilities were inadequate, related services professionals had

[3] Although the date on the form for the CSE meeting minutes was August 14, 2008 (Parent Ex. F), the hearing record reveals that the meeting actually took place on August 15, 2008 (Tr. p. 497; Parent Exs. D at p. 1; G).

not been hired as of mid-July, and it was unclear whether the district could fulfill the student's IEP mandates at the recommended program (Parent Ex. A at pp. 1-5).

The district answered the due process complaint notice on September 16, 2008, denying the allegations in the due process complaint notice and requesting reimbursement for the cost of the student's pendency placement (Dist. Ex. 2).

An impartial hearing began on October 6, 2008 and concluded on February 3, 2009, after five days of testimony (IHO Decision at p. 3). By decision dated March 19, 2009, the impartial hearing officer (Hearing Officer 2) found that: (1) the absence of an additional parent member at the May 2008 CSE meeting was a procedural error, but that error did not deprive the student of a free appropriate public education (FAPE); (2) the student's May 2008 IEP was tailored to meet her unique needs; (3) the failure of the district to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) did not render the IEP inappropriate; (4) notwithstanding the appropriateness of the IEP, the district's recommended program could not meet the student's unique needs and was not appropriate; (5) the district's recommended program did not have related services therapists in place at the beginning of the school year to provide the student with OT, speech-language, and counseling services; (6) the student required a program in which speech-language, OT, and counseling services were integrated into the school program rather than provided at home; (7) the student, who needs a 12-month school year, would be ill-served by a school which displaced her by moving her to a different location for the summer; (8) the Rebecca School was appropriate to meet the student's needs as evidenced by the progress that the student is making; (9) the parents cooperated with the district; and (10) although the parents contracted with the Rebecca School prior to the May 2008 CSE meeting and prior to visiting the public school placement, equitable considerations did not prohibit the parents from doing so (id. at pp. 10-12). Having found that the district's recommended program was not appropriate to meet the student's needs, that the Rebecca School was appropriate, and that equitable considerations supported tuition reimbursement, Hearing Officer 2 ordered the district to reimburse the parents for the cost of the Rebecca School tuition for the 2008-09 school year upon proper proof of payment (id. at p. 13).

The district appeals and asserts that the parents failed to allege in their due process complaint notice that the provision of related services in an environment other than a school placement would be inappropriate for the student and that transitioning the student from a temporary summer placement to a full-time placement in the fall would be inappropriate for the student. The district argues that it offered the student a FAPE for the 2008-09 school year and even if the district failed to offer the student a FAPE, equitable considerations favor a reduction or elimination of any tuition reimbursement award. With regard to summer 2008, the district alleges that the parents "waived" the student's summer placement because the parents had already obtained funding from the district to continue the student at the Rebecca School through August 2008. In addition, the district asserts that it offered the student a placement prior to the start of the 2008-09 school year and although the student's summer program would have been at an alternate site, the recommended site was ready for students in September 2008. The district also alleges that it is entitled to recoup funds paid to the parents pursuant to pendency. The district further contends, for the first time on appeal, that the remedy of tuition reimbursement is unavailable because the Rebecca School is a for-profit school. In support of its for-profit argument, the district has attached two exhibits to its petition as additional evidence. The district seeks an order dismissing the proceeding for the parents' failure to state a claim because tuition reimbursement cannot be granted

for placement in a for-profit school, annulling the parts of Hearing Officer 2's decision that found that the district failed to offer the student a FAPE and that equitable factors favored the parents, dismissing the petition with prejudice, and ordering the parents to reimburse the district for funds paid during pendency.

In their answer and cross-appeal, the parents assert that the petition should be dismissed for insufficient pleading and because the parties' dispute will soon become moot due to pendency and the end of the 2008-09 school year. The parents also allege that the district failed to raise its "for-profit" defense below in its answer to the due process complaint notice or at the impartial hearing, and that the district's for-profit defense is without legal merit. In addition, the parents assert that the district's additional documentary evidence should not be accepted because it could have been offered at the time of the impartial hearing and it is being proffered for an inappropriate and prejudicial purpose. The parents further assert that they raised the issues that Hearing Officer 2 ruled upon both in their due process complaint notice and at the impartial hearing. The parents also contend that Hearing Officer 2 correctly found that equitable considerations support an award of tuition reimbursement because they cooperated with the district and they could have received a refund of their tuition payment from Rebecca School, less the $2,500 nonrefundable deposit, had the district offered the student an appropriate program. The parents assert that the district is not entitled to recoupment of the tuition that it has paid since the Rebecca School is the student's pendency placement.

The parents assert in their cross-appeal that the district's May 2008 IEP failed to offer the student a FAPE because, among other things, the district's IEP was substantively insufficient to meet the student's needs; the IEP offered insufficient 1:1 OT; and the district failed to offer individualized parent counseling and training. The parents further assert that they were excluded from full participation in the CSE meeting; there was no discussion of all of the proposed goals for the student; and there was no additional parent member at the CSE meeting. In addition, the parents allege that the district did not offer a placement for the student for summer 2008 and the site that was offered in June 2008 was closed for summer 2008. With regard to the proposed placement for the student, the parents assert that it was inappropriate for the student because it was not fully set up by late September 2008 in that there was no sensory gym and an occupational therapist had not yet been hired. The parents assert that Hearing Officer 2's decision correctly found that the Rebecca School was appropriate to meet the student's unique needs and the district did not appeal this determination; therefore, this determination should be affirmed. The parents also allege that Hearing Officer 2 correctly found that the parents cooperated with the district.

In its answer to the parents' cross-appeal, the district asserts that the parents were not aggrieved by Hearing Officer 2's decision and therefore, they cannot cross-appeal. The district also alleges that its petition complied with all of the relevant pleading requirements. In addition, the district contends that the petition is not moot because the decision on appeal should be issued prior to the end of the 2008-09 school year, and the district has requested the remedy of being reimbursed for the pendency funds.

As an initial procedural matter, the district attached two exhibits to its petition in support of its assertion that tuition reimbursement is not an available remedy for a parental placement in a for-profit school. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is

necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 09-001; Application of a Student with a Disability, Appeal No. 08-129; Application of a Student with a Disability, Appeal No. 08-030). In this case, the parents object to this additional documentation. Moreover, I am not persuaded that this evidence was unavailable at the time of the impartial hearing. Accordingly, I will not consider the additional documentary evidence submitted by the district with its petition.

Second, the parents request that those arguments raised in the petition that refer to the district's memorandum of law for further delineation be dismissed as insufficient and not considered on appeal. State regulations require the petition for review to clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and to indicate what relief should be granted by a State Review Officer to the petitioner (8 NYCRR 279.4[a]; see Application of the Bd. of Educ., Appeal No. 07-097). While most of the district's petition fully complies with the pleading requirements, the petition contains conclusory allegations that make reference to the district's memorandum of law; however, I note that the memorandum is not a substitute for a properly drafted petition for review (see 8 NYCRR 279.4, 279.6). In the exercise of my discretion, I decline the parents' request to reject the arguments in the district's petition on sufficiency grounds; however, I remind the district's counsel to ensure compliance with Part 279 of the State regulations in the future.

Third, the district argues that the parents are not aggrieved by Hearing Officer 2's determination that the student's IEP was appropriate because Hearing Officer 2 awarded them tuition reimbursement (see IHO Decision at pp. 10-11, 13). As a general rule, a party who has successfully obtained the full relief sought is not aggrieved and may not appeal "even where that party disagrees with the particular findings, rationale or the opinion supporting the judgment or order below in his favor" (Parochial Bus Sys. Inc. v. Board of Educ., 60 N.Y.2d 539, 545 [1983]; Application of the Dep't of Educ., Appeal No. 09-019). However, where, as here, the responding party has no right to appeal, an exception provides that the responding party may nevertheless cross-appeal to seek "review of a determination incorrectly rendered below where, otherwise, he [or she] might suffer a reversal of the final judgment or order upon some other ground" (Parochial Bus Sys Inc., 60 N.Y.2d at 545). In this case, the parents are not aggrieved by Hearing Officer 2's conclusion that the district failed to offer the student a FAPE; however, by appealing and asserting that it offered the student a FAPE, the district has opened the door for the parents to seek review of Hearing Officer 2's determination that the student's IEP was appropriate. Accordingly, I will consider the parents arguments regarding the appropriateness of student's IEP.

Fourth, on appeal, the parents and the district have raised arguments regarding the student's placement during summer 2008. However, in a decision dated October 29, 2007, Hearing Officer 1 ordered the district to reimburse the parents' tuition costs at the Rebecca School for the 2007-08 school year for a 12-month period from September 2007 to August 2008 (Parent Ex. B at p. 10). Hearing Officer 1's decision was not appealed by the parties (Tr. pp. 5-6). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Consequently, Hearing Officer 1's decision to order the district to reimburse the parents for the student's tuition at the Rebecca School through August 2008 is final and binding upon the parties (see Application of the Dep't of Educ., Appeal No. 09-033; Application of a Student with a Disability, Appeal No. 08-021; Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child Suspected of Having a Disability, Appeal

No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100). Therefore, I will not address this issue.

Fifth, the parents request that the petition be dismissed as moot because the appeal was filed near the end of the 2008-09 school year and the student's program will have been provided as her pendency placement. The district counters that its appeal is not moot because the decision by a State Review Officer should be rendered prior to the end of the 2008-09 school year, and it is seeking recoupment of the tuition payments that it has paid pursuant to the student's pendency. The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]). As of the date of this decision, the 2008-09 school year has not ended and a decision will have an actual effect upon the rights of the parties, thus, the appeal is not moot.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]; Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]; see also T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252-53 (2d Cir. Feb. 3, 2009).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally,

school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Turning to the district's contention that it offered the student a FAPE for the 2008-09 school year, for the reasons set forth below, I agree with the impartial hearing officer that the district did not offer the student a FAPE, but on different grounds. A review of the May 2008 IEP reveals that it contains much of the information from the student's Rebecca School progress reports which were available to the CSE at the time of the May meeting (compare Parent Ex. Q at pp. 3-8, 11, 13, 18, with Parent Ex. C at p. 4). The student's present levels of academic performance reflected that the student was at an early first grade level in decoding skills and listening comprehension, at a kindergarten level in writing skills, and at an upper kindergarten level in math computation and problem solving skills (Parent Ex. C at p. 3). The May 2008 IEP reflected that the student's scripting and crying behaviors had been decreasing while the duration of her engagement in activities had increased, and that the student was able to decode some basic consonant-vowel-consonant words, identify some coins, add at least five objects, and form upper case letters (id.). The student's present levels of social-emotional performance reflected that the student was happy and active, engaged with peers, and was beginning to include other peers into her play (id. at p. 4). The May 2008 IEP reflected that the student continued to use scripted language to communicate, which was usually purposeful and appropriate to the situation, and that her use of words for communication was emerging (id.). However, when her use of scripted language increased, it became difficult to engage her in an activity (id.). The student had improved her ability to recognize and label basic emotions in herself and others and was able to use coping strategies to regulate her emotions when her environment became over stimulating (id.). The May 2008 IEP indicated that the student's pretend play skills and social problem solving skills were emerging and that she had become flexible in tolerating changes or expanding on her play (id.). The student's teacher from the Rebecca School testified that at the time of the CSE meeting, the academic and social-emotional present levels of performance on the student's May 2008 IEP were an accurate portrayal of the student's abilities (Tr. pp. 306-08).

However, the hearing record reveals that information regarding the student's sensory needs, which was contained in all of the student's progress reports that were available to the May 2008 CSE, was not included in the student's present levels of health and physical development, nor was this information reflected anywhere else on the May 2008 IEP (Parent Ex. C at p. 5). The student's December 18, 2007 OT progress report indicated that the student was "sensory seeking" and required a sensory diet of proprioceptive, vestibular, and tactile activities both in therapy sessions and in the classroom to assist her sensory processing and increase her ability to function in the classroom setting (Parent Ex. Q at pp. 15, 17). At the Rebecca School, the student had been receiving many sensory breaks throughout the day, which allowed her to "be in an environment with decreased auditory input while simultaneously providing her with the proprioceptive and tactile input she craves" (id. at p. 16). However, when regulated and motivated, the student was able to demonstrate attention to tasks for 10-15 minutes (id. at p. 15). The student's psychologist also indicated in her January 2008 counseling progress report, that at times the student becomes overly active and/or emotionally disregulated and has difficulty focusing on an activity or participating in back and forth interaction (id. at p. 18). At these times, the student resorted to scripts that she had learned from movies and television shows (id.). Testimony by the student's social worker at the Rebecca School indicated that the student needs to have the opportunity to re-regulate herself with sensory equipment and sensory activities in order to participate in the learning environment and that the student's sensory needs are what is focused on most at the Rebecca School (Tr. pp. 238, 243-44).

The student's speech-language pathologist at the Rebecca School testified that she provides sensory input in her office when the student is not attending to her or is not engaging with her, such as a little massage or some vibration, in order to get her to focus and that she consults with the student's occupational therapist regarding this (Tr. pp. 275-76). The student's head teacher from the Rebecca School testified that the teachers and therapists use a lot of sensory strategies to deal with the student's behaviors (Tr. pp. 363-64). She further stated that she adapts curricula for the student to make activities sensory based (Tr. p. 365). The student's head teacher testified that, "rather than doing a worksheet, I try and find a way to make it either gross motor movement or sensory based to keep her engaged longer and to also drive her sensory needs" (id.). The student's occupational therapist from the Rebecca School testified that the student's greatest area of need to be served by OT is her sensory modulation, and that she addresses this need with gross motor sensory work, including the use of obstacle courses, swings, and trampolines in the sensory gym (Tr. pp. 379-80). She further stated that the student required a lot more prompting when sensory motor activities were not provided and that the student's sensory needs interfered with her ability to learn and participate in school because she becomes avoidant and it can affect her engagement with academics and with peers (Tr. pp. 384-85). The student's social worker at the Rebecca School testified that "sensory integration is a big piece of [the student's] day and it helps to calm her to help her stay regulated and involved in what's going on in the classroom or in our sessions" (Tr. p. 469).

Moreover, the hearing record reflects that the May 2008 CSE requested and the student's mother agreed to forward the student's spring 2008 progress reports from the Rebecca School for use in developing the student's speech-language and OT goals (Tr. pp. 311, 484-85). The student's mother testified that when the CSE received the reports, they called her, said they had received the reports, and asked again if they could use them (Tr. p. 485). I note that even though the CSE had these updated reports and utilized them to develop the student's speech-language and OT goals, a description of the student's sensory deficits and needs was omitted from the student's present levels of performance on the resultant May 2008 IEP (Parent Ex. C at pp. 3, 4, 5). The student's April 11, 2008 OT progress report reflected that, although she had made progress in her overall sensory processing, impulse control and regulation abilities, she continued to require sensory based gross motor activities prior to attempting table-top activities, continued to demonstrate difficulty modulating her movements and emotional state when she was angry, upset or frustrated, and continued to revert back to familiar verbal scripts to calm herself (Parent Ex. Y at pp. 1-2). The speech-language pathologist reported in the student's April 2008 progress report that the student was able to follow two-part unrelated directives with occasional cueing when she was regulated and engaged, but became distracted by her scripting and by environmental stimuli, which impeded her ability to follow through with given directives (Parent Ex. AA at p. 2). I also note that, although the CSE reconvened in August 2008 and the resultant IEP reflected additional information in the student's present health status, indicating that the student had severe motion sickness, had difficulty communicating her needs, cried when frustrated and that the student had a diagnosis of PDD-NOS, the August 2008 CSE did not modify the student's present levels of performance to include information regarding her sensory deficits (Parent Ex. D at pp. 3, 4, 5).

For the foregoing reasons, I find that the May 2008 and the August 2008 IEPs inadequately described the student's sensory deficits which significantly affected her academic and social performance and therefore, the district did not offer the student a FAPE.

Having found that the district failed to offer the student a FAPE, I turn to the appropriateness of the parents' unilateral placement. The district does not appeal the finding of Hearing Officer 2 that the Rebecca School was appropriate to meet the student's unique needs. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Consequently, Hearing Officer 2's decision that the Rebecca School was an appropriate placement for the student is final and binding upon the parties (see Application of the Dep't of Educ., Appeal No. 09-033; Application of a Student with a Disability, Appeal No. 08-021; Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

I now turn to the issue of whether equitable considerations favor of an award of tuition reimbursement. The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of

Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

In this case, although the parents secured a place for the student at the Rebecca School prior to the May 2008 CSE meeting, the enrollment contract permitted the parents to enroll the student in the district's program as recommended by the district's CSE any time prior to September 8, 2008 and receive a tuition refund less the $2,500 non-refundable deposit (Parent Exs. S; T at p. 5). The parents fully participated in the CSE process (Parent Exs. C at p. 2; D at p. 2; H-M; Q). In July 2008, the student's mother made multiple phone calls to the district and learned that, although the recommended site was not due to open until September 2008, an information session would be held at a similar program later in the week (Parent Ex. M at p. 1). The student's mother stated that, although she did not receive an invitation to the session, she would be attending the session in order to evaluate the proposed placement and would contact the CSE office after the visit (id.). The student's mother attended the district's informational session in July 2008 (Tr. pp. 489-90; Parent Ex. L at pp. 1-2). After noting her concerns with the district's recommended placement, the student's mother provided the district with notice of the unilateral placement and offered to consider a different placement if the district offered one before September 2008 (Parent Ex. L). The district does not contend that the parents' notice of unilateral placement was untimely or did not otherwise conform with the legal requirements of 20 USC § 1412(a)(10)(C)(iii)(I). Under the circumstances of this case, I agree with Hearing Officer 2's finding that equitable considerations support an award of tuition reimbursement (IHO Decision at pp. 12-13).

Finally, the district argues that the parents have failed to state a claim for which relief can be granted because tuition reimbursement is not an available remedy when a student is enrolled in a for-profit school. In their answer, the parents assert that the district's for-profit defense was improperly interposed for the first time on appeal. In its answer to cross-appeal, the district did not respond the parents' assertion that this affirmative defense was improperly interposed on appeal. The hearing record reveals that the district did not challenge the due process complaint notice as insufficient or raise its for-profit defense below, and there is no testimony or documentary evidence in the hearing record that is relevant to this issue. Accordingly, I decline to address this issue, in part because it was not raised below and is not properly before me (see Educ. Law § 4404[2]; 34 C.F.R. § 300.508[d][1]; 8 NYCRR 200.5[i][3], 279.12[a]).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

Dated: Albany, New York
June 19, 2009

PAUL F. KELLY
STATE REVIEW OFFICER